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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 424

MEMPHIS NATURAL GAS COMPANY,

Appellant,

vs.

GEORGE F. McCANLESS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, AND J. C. JOHNSON, CONSTABLE OF SHELBY COUNTY, TENNESSEE

Appellees

APPEAL FROM THE SUPREME COURT OF TENNESSEE

STATEMENT AS TO JURISDICTION

I. Nature of Case and Statutory Provisions Sustaining Jurisdiction

This is an appeal under Section 237(a) of the Judicial Code, as amended, 28 U. S. C. A. 344(a). There was drawn in question in the Supreme Court of Tennessee the validity of several statutes of Tennessee on the ground that they are repugnant to the Constitution and laws of the United States, and the decision was in favor of their validity.

The late Mr. Chief Justice Stone stated in *Charleston Federal S. & L. Assn.* v. *Alderson*, 324 U. S. 182:

> "It is essential to our jurisdiction on appeal under Paragraph 237(a) that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the Federal Constitution, treaties or laws."
>
> • • • • • • •
>
> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal."

The appellant complied in the Supreme Court of Tennessee with the foregoing requirements as specifically pointed out in II hereof.

The final judgment of the Supreme Court of Tennessee was entered on the 4th day of May, 1946.

The facts involved are not in dispute and may be briefly stated as follows:

This suit was filed in the Chancery Court of Davidson County, Tennessee by the Memphis Natural Gas Company on October 2, 1939 to recover $12,540.48 representing inspection fees exacted of it by a distress warrant for the years 1937, 1938 and 1939 upon the ground that it is a public utility subject to the control and jurisdiction of the Railroad and Public Utilities Commission and liable for inspection, control and supervision fees required of all public utilities doing business in Tennessee.

The Memphis Natural Gas Company contended that it is not a public utility under the common law, and further that it is not a public utility as defined in the Tennessee statutes. It contended that the State statutes, as applied, are repugnant to the Federal Constitution and laws and

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violate Amendment XIV of the United States Constitution "nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" and also violate the Commerce Clause, Article I, Section 8 of the United States Constitution that Congress shall have the power to "regulate commerce . . . among the several States."

The Memphis Natural Gas Company is a private Delaware corporation, domesticated in Tennessee, owning and operating a pipe line which originates in Louisiana, passes through Arkansas and Mississippi and terminates in Tennessee. Its general offices are in Memphis. The natural gas transported by it is wholly owned by the pipe line corporation and it transports no natural gas for others. The natural gas is sold at wholesale in Louisiana, Arkansas, Mississippi and Tennessee to distributing companies. The pipe line corporation distributes no gas in either Tennessee or the other States. Obviously a large part of the pipe line's gross receipts are derived from sources outside of Tennessee. The Tennessee statutes in question and applied to the pipe line corporation require the payment of fees for the maintenance of the State Commission measured by the gross receipts of the public utility. The fees are exacted for the maintenance of the State Commission and its staff.

The Tennessee statutes in question creating the State Commission impose upon the Commission and its staff the customary duties for the inspection, control, supervision and regulation of all public utilities as defined in the statutes. The definition includes "gas, electric light, heat, power, water, telephone, telegraph or any other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses or agreements, granted by the State or by any political subdivision

thereof," etc., and further directs "the provisions of this statute shall be construed to apply to and affect only public utilities which furnish products or services within the state," etc.

Your pipe line corporation insisted in the suit brought by it that it is not a public utility under the common law and that it is not a public utility under the statutory definition, but the trial court construed and applied the statutes to appellant in such manner that this private interstate pipe line corporation has been classified a public utility subject to the control and regulation of the State Commission as to all of its activities, and required to contribute a very large annual sum for the maintenance of the State Commission. This conclusion was reached by the trial court in the face of the undisputed fact that the charter of the corporation plainly shows that it is a private corporation in no sense dedicated to the public use, does not profess to serve the public, and does not possess by charter or otherwise the customary rights of eminent domain and other similar rights enjoyed by public utilities.

The undisputed facts show that the appellant had in the years involved, 1937, 1938 and 1939, two customers in Tennessee to which the pipe line corporation sold at wholesale the natural gas solely owned by the pipe line corporation and transported by it from Louisiana to Tennessee. The two customers were the Memphis Power & Light Company, a New Jersey corporation domesticated in Tennessee, which distributed the gas in Memphis and Shelby County, and the West Tennessee Power & Light Company, a Florida corporation domesticated in Tennessee, which distributed the gas to the public in several other Tennessee counties. At the time this suit was instituted there was pending in the courts of Tennessee a very important suit between the Memphis Natural Gas Company and the State

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of Tennesssee involving the question of the pipe line corporation's liability for income taxes. The proof was voluminous and detailed everything pertaining to the pipe line corporation's activities in Tennessee. The principal issue in the suit was the construction of the contract between the pipe line corporation and the Memphis Power & Light Company. To avoid duplication of work, it was stipulated in this present suit that all of the facts found and determined by the Supreme Court of Tennessee and the Supreme Court of the United States in the income tax suit shall be considered a part of the proof in this present suit as the income tax suit involves the same years here involved. In this manner *Memphis Natural Gas Company* v. *Pope*, 178 Tenn. 580, and the appeal therefrom, *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, are a part of the proof in this suit (R. 60).

The trial court construed *Memphis Natural Gas Company* v. *Beeler*, 315 U. S. 649, to mean in substance that this private pipe line corporation is a public utility and predicated its decision upon this proposition. The Supreme Court of Tennessee affirmed for the same reason and applied the Tennessee statutes to appellant.

There is nothing in either of said decisions to support the conclusion that appellant is a public utility or that there is factual basis to apply to appellant the Tennessee statutes presently in question. The same is true of the other proof in this cause.

In said decisions it was held that the contract between the pipe line corporation and the Memphis Power & Light Company provided in substance that the pipe line corporation had a profit-sharing arrangement with the Memphis Power & Light Company, the distributing company, and was therefore engaged in intrastate commerce and liable for income taxes. The contract was construed to mean that the

pipe line corporation obligated itself to transport the gas to Tennessee and sell it wholesale to the Memphis Power & Light Company, which, in turn, obligated itself to distribute and sell the gas at retail in Memphis and Shelby County. At the end of the year the two corporations, pursuant to the contract, pooled their respective net incomes from the gas sold by the pipe line corporation to the Memphis Power & Light Company which in turn was resold by it to the public. This profit-sharing contract and the decisions construing it plus the further fact that the pipe line corporation is domesticated in Tennessee and secured at the time of the construction of the pipe line permits to lay the pipe line under various highways and roads have been held sufficient in this present case to transform this private pipe line corporation into a public utility in violation of the Fourteenth Amendment and the Commerce Clause of the Constitution.

The contract of the pipe line corporation with the West Tennessee Power & Light Company (the distributor outside of Shelby County) did not have the profit-sharing feature and was therefore not drawn into the litigation involving income taxes.

On October 17, 1945 the trial court rendered the adverse decision. An appeal was perfected to the Supreme Court of Tennessee, which, on the 4th day of May, 1946, affirmed.

Absence of attorneys in the armed forces delayed the initial trial.

Repeatedly the Supreme Court of Tennessee, in its opinion, states that the pipe line corporation's charter "gave it power to do business as a public utility." This is extreme error. The original charter of June 11, 1928 did in substance so provide, but the charter was amended a few weeks later on August 7, 1928 and the right to transport "gas or oil for the public generally as well as

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for the use of said corporation" was eliminated. (Exhibit 1 to Johnson's Deposition.) Appellant emphasized in its brief in the Supreme Court of Tennessee the undisputed fact that there is nothing in the charter giving it the right to serve the public, but the Supreme Court of Tennessee, as shown by its opinion, completely overlooked this undisputed fact and predicated its decision largely on the ground that the corporation is by charter a public utility. Such action where the fact is not in dispute *ipso facto* is a violation of the Fourteenth Amendment.

The appellant also complained in the state court that there was not at any time during the years involved any inspection, control, supervision or regulation of any of its properties in Tennessee by the Commission or any of its representatives. The appellant introduced evidence that during the years involved there was no inspection and therefore the exaction of the fees was on a fictitious basis and could not be justified as a lawful exercise of the State's police power. The evidence on this point is not in dispute, but the Supreme Court of Tennessee found that the pipe line corporation's witnesses "testified that inspections were made" (Opinion, p. 30). This is extreme error and to find a fact inconsistent with undisputed evidence violates the Fourteenth Amendment. (Johnson's Deposition, R. 27, 35; Dearth's Deposition, R. 56.)

The pipe line corporation further complained in the state courts that both prior to and since the passage of the Federal Natural Gas Act, June 21, 1938, c. 556, Par. 1, 52 Stat. 821, 15 USCA 717, an interstate pipe line corporation such as this is not subject to state regulation because of the Commerce Clause of the Federal Constitution. It is undisputed that since the passage of said Act the appellant has recognized and conformed to the jurisdiction of the Federal Power Commission over it. A violent collision

of Federal regulation and state regulation results from the Tennessee decision.

The application of the Tennessee statutes to the pipe line corporation was unconstitutional under the Fourteenth Amendment and Commerce Clause of the Constitution of the United States.

It makes no difference that the pipe line corporation was engaged, in part, in intrastate commerce by virtue of the profit-sharing contract. Doing some intrastate business will not transform a private corporation into a public utility unless the corporation professes to serve the public and is actually doing so. The undisputed facts are that the pipe line corporation does not distribute any gas to the public and mere ownership of a part of the profits made by the distributing company, Memphis Power & Light Company, cannot transform a private corporation into a public utility without violating important and substantial Federal constitutional rights.

II. State Statutes the Validity of Which Are Involved

There was thus drawn in question the validity, under the Fourteenth Amendment and Commerce Clause, of certain statutory provisions of the State of Tennessee as follows:

> Chapter 49, Section 3 of the 1919 Public Acts of Tennessee as amended by Section 1, Chapter 42 of the 1935 Public Acts of Tennessee, Tennessee Code 5448:
>
> "'PUBLIC UTILITIES' DEFINED.—The term 'public utility' is defined to include every individual, copartnership, association, corporation, or joint stock company, their lessees, trustees, or receivers, appointed by any court whatsoever, that own, operate, manage or control, within the State of Tennessee, any street railway, interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, or any

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other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof;" (remainder irrelevant and not copied).

Chapter 49, Section 10 of 1919 Public Acts of Tennessee, Tennessee Code 5456:

"PROVISIONS APPLY TO WHAT UTILITIES.—The provisions of this statute shall be construed to apply to and affect only public utilities which furnish products or services within the state, and this statute shall not be construed to extend to any public utility engaged in interstate commerce for the government or regulations of which jurisdiction is vested in the interstate commerce commission or other federal board or commission."

Chapter 107, Section 1 of 1921 Public Acts of Tennessee, Tennessee Code 5459:

"FEE FOR INSPECTION, CONTROL, ETC., OF UTILITIES.—Every public utility doing business in this state and subject to the control and jurisdiction of the railroad and public utilities commission to which the provisions of this statute apply, shall pay to the State of Tennessee on or before April 1st of each year, a fee for the inspection, control, and supervision of the business, service, and rates of such public utility."

Chapter 107, Section 1 of 1921 Public Acts of Tennessee as amended by Section 1, Chapter 139 of the 1935 Public Acts of Tennessee, Tennessee Code 5461:

"FEE MEASURED BY GROSS RECEIPTS; RATES FIXED.—The amount of such fee is to be measured by the amount of the gross receipts of each public utility in excess of five thousand dollars. The fee fixed and assessed against and to be paid by each public utility is as follows: $3.00 per $1,000.00 for the first $1,000,000.00 or less of such gross receipts over $5,000.00; 75 cents

per $1,000.00 for each additional $1,000.00 of such gross receipts over and above $1,000,000.00."

III. Date of Judgment and Appeal

The final judgment and opinion of the Supreme Court of Tennessee rendered on the 4th day of May, 1946, plainly sustained the constitutionality of the above Tennessee statutes as applied to appellant, and in violation of the Fourteenth Amendment and Commerce Clause of the Constitution of the United States.

Petition for appeal to this Court was presented to the Honorable Chief Justice Grafton Green of the Supreme Court of Tennessee on the 30th day of July, 1946 and was by him allowed the same day.

IV. Manner in Which Federal Questions Were Raised

The applicability of the statutes to appellant was challenged in the original complaint by setting forth therein the statutes and challenging their applicability to appellant (R. 1).

The Federal questions were raised in the Supreme Court of Tennessee by assignments of error, brief and argument as permitted by the state practice.

The assignments of error so made in the Supreme Court of Tennessee were:

> "The Chancery Court erred in dismissing the bill for the recovery of the inspection fees paid under protest and thereby holding the Company liable for inspection fees because:
>
> "1. The Memphis Natural Gas Company was not a public utility during the years involved.
>
> "2. It was not subject to the control and jurisdiction of the Railroad and Public Utilities Commission.
>
> "3. It was not the kind of corporation to which the provisions of the statutes relating to public utilities apply.

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"4. There was no inspection, control and supervision of the business, service and rates of the Memphis Natural Gas Company as there was no legal basis for any such inspection, control and supervision and to impose upon a private interstate pipe line corporation a charge of $12,540.48 for three years fictitious inspection, control and supervision of such a company to maintain the State Commission is a violation of Amendment XIV of the United States Constitution 'nor shall any State deprive any person of life, liberty or property without due proces of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"5. The imposition of this heavy annual burden upon such a private corporation and the conversion of a private corporation by legislative and commission fiat into a public utility violates Amendment XIV of the United States Constitution 'nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"6. The imposition of this heavy annual burden upon such a private corporation engaged in the interstate transportation of natural gas for sale at wholesale to distributing companies is a direct burden upon interstate commerce and an unlawful interference with interstate commerce which violates Article I, Section 8 of the United States Constitution that Congress shall have power to 'regulate commerce * * * among the several States.'

"7. The fee schedule provided in Code 5461 is in effect a gross receipts tax. The fee schedule is $3.00 per $1,000.00 for the first $1,000,000.00 of gross receipts and 75 cents per $1,000.00 of gross receipts above $1,000,000.00. If an interstate corporation, private or public, is subject to any regulation by Tennessee or any of its agencies such as the Railroad and Public Utilities Commission, the State may exact of such corporation only actual reimbursement of expenses incurred by the

State in the lawful exercise of its police powers. There was never at any time during the years involved any so-called inspection, control or regulation of the Memphis Natural Gas Company by the Commission and therefore any imposition of fees upon the interstate pipe line corporation necessarily violates Amendment XIV of the United States Constitution and Article I, Section 8 of the United States Constitution because the State and none of its agencies incurred any expenses and did nothing with reference to the Memphis Natural Gas Company and therefore no expenses were incurred for which reimbursement can be claimed.

"8. Because it also violates Article I, Section 21 of the Constitution of Tennessee 'that no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor.' "

Pages 3, 4 and 5 of the Assignments of Error, Brief and Argument by Appellant in the Supreme Court of Tennessee.

The opinion of the Supreme Court of Tennessee, appended to this statement, affirmatively shows that the Federal questions were presented to, considered and decided by it. Said opinion states in part with reference to the decree and judgment of the trial court that it

"is assailed by the assertion that the Memphis Natural Gas Company was not, during the years in question, (1) a public utility, (2) subject to control of the Railroad and Public Utilities Commission, (3) nor a corporation to which statutes relating to public utilities apply; that therefore, the inspection was both illegal and fictitious and the imposition of the fees therefor, was violative of the rights of the Gas Company under the 'due process' (Amendment XIV) and 'commerce' (Art. I, sec. 8) clauses of the United State Constitution, and of Art. I, sec. 21 of the Constitution of Tennessee; and

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that finally, the inspection fee is in effect, a gross receipts tax, not based on costs and expenses incurred by the State, in lawful discharge of the police powers and, therefore, the imposition of this tax on the Gas Company violates the 'due process' and 'commerce' clauses of the United States Constitution."

* * * * * * *

"The first three sub-sections of the assignment of error are overruled, and we hold that in its operation during the three years preceding April 1, 1939, the Gas Company was a public utility, subject to regulation and control by the Railroad and Public Utilities Commission, and subject to all statutes of Tennessee having to do with public utilities."

Opinion of Supreme Court of Tennessee, (Pages 22, 28).

V. The Federal Questions Involved Are Substantial

The Supreme Court of Tennessee decided that this interstate private pipe line corporation is a public utility and must assist in supporting the State Commission because of the facts found in *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, which seems in no sense to justify the transformation of a private corporation into a public utility and the taking of private property for public purposes without due process of law, a denial of the equal protection of the laws and the subjugation of an important interstate property to local regulation.

The other proof in this record is merely corroborative of the facts found and determined by the Supreme Court of the United State in said decision.

It is true said decision found that the contract between the pipe line corporation and the Memphis Power & Light Company, the distributing agency, was of such a nature that it could be said the pipe line corporation was doing

some intrastate business in Tennessee because it was entitled, pursuant to the contract, to a part of the profits made by the Memphis Power & Light Company from the sale and distribution of gas. Being entitled to receive at the end of each year a part of the profit made by another corporation does not cause the recipient corporation to become a public utility. The gist of the decision by the Supreme Court of the United States is:

> "The contract was entered into as a preliminary to the award by the City of Memphis to the Memphis (Power & Light) Company of its franchise to distribute gas to consumers, and execution of the contract was a condition of the grant of the franchise. By the contract the Memphis (Power & Light) Company undertook to establish its distribution system. Taxpayer (pipe line corporation) undertook to construct its pipe line with facilities, including measuring stations, at a delivery point, for supplying the Memphis (Power & Light) Company with a varying flow of gas into the service pipes as and when required by the Memphis (Power & Light) Company for consumer needs.
>
> • • • • • • •
>
> "At the end of each year the combined net surplus or deficit of the two companies was to be divided between them by a cash settlement.
>
> • • • • • • •
>
> "We cannot say that there is not a substantial basis for the state court's conclusion that in substance the contract called for the contribution of the services and facilities of the companies to a joint enterprise, the taxpayer's (pipe line corporation) delivery of gas into the mains of the Memphis (Power & Light) Company for distribution to consumers, and a division between the two companies of the operating profits after providing for certain agreed initial costs and expenses. Nor can we say that by this participation the taxpayer

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(pipe line corporation) did not do such a business in the state as to be taxable there, or that the profits derived from it are not an appropriate measure of the tax." (Parenthetical insertions ours.)

The Supreme Court of Tennessee held, however, in the present appeal that the foregoing quotation means that the pipe line corporation "had, jointly with the Memphis Power & Light Company, a contract with the City of Memphis to furnish natural gas to all citizens of that municipality." (Opinion, page 22). It therefore applied the statutes of Tennessee to appellant and concluded that it is a public utility, which is at variance with all of the proof in the record.

In *Producers Transportation Co.* v. *Railroad Commission of State of California,* 251 U. S. 228, it is said:

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment."

See also *Michigan Public Utilities Commission, et al.* v. *Duke,* 266 U. S. 570, in which a private interstate motor carrier was subjected to the jurisdiction of the State Commission but the Supreme Court of the United States said it could not be done.

> "This is to take from him use of instrumentalities by means of which he carries on the interstate commerce in which he is engaged as a private carrier and so directly to burden and interfere with it."

It makes no difference, however, whether the private corporation sought to be regulated is in intrastate or interstate business, as the criterion is whether or not it is in fact a public utility. If it is a private corporation, intrastate or interstate, it cannot be converted into a public utility by legislative fiat or judicial action such as reflected by the opinion of the Supreme Court of Tennessee without violating constitutional rights.

In *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, an ice manufacturing corporation of Oklahoma distributing ice locally was subjected to regulation by the State Commission on the theory that it was a public utility. The Supreme Court would not permit it and said:

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 513, 44 S. Ct. 412, 413, 68 L. Ed. 813, 32 A. L. R. 661, and authorities cited; *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 113, 49 S. Ct. 57, 73 L. Ed. 204."

It is also stipulated in this suit that the facts found and appearing in *Memphis Natural Gas Co.* v. *McCanless*, 180 Tenn. 688, be considered a part of the proof in this present suit (Stipulation, R. 60). The case just mentioned, 180 Tenn. 688, involved the liability of the pipe line corporation for a gross receipts tax imposed for the privilege of distributing natural gas. The gross receipts taxes involved were for the years 1937, 1938 and 1939, which are the

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same years involved in this present appeal. The Supreme Court of Tennessee found for a fact—

> "The distributing agencies (Memphis Power & Light Company) pay the complainant (pipe line corporation) for the gas taken by them at these various connections and the complainant (pipe line corporation) has nothing to do with the distribution and sale of the gas by such agencies." (Parenthetical insertions ours.) (Page 691)

Obviously there is no dispute about the fact that the pipe line corporation does not distribute gas and renders no service to the public, has no charter power to serve the public, does not possess the right of eminent domain or the other attributes common to public utilities.

But the Supreme Court of Tennessee applied the statutes to appellant and found facts in direct conflict with the undisputed facts, and decided many important Federal questions in a way which conflicts with applicable decisions of this court.

The presumption of constitutionality cannot suffice to sustain the applicability of the statutes to appellant in view of the undisputed facts which the Supreme Court of Tennessee has erroneously applied.

The Supreme Court of Tennessee held without justification that:

> "The Gas Company was operating under privileges and franchises from the City of Memphis, seven West Tennessee counties, and the State of Tennessee through its Highway Department, and that the scope of the powers granted the corporation in its charter, gave the corporation the right to operate as a public utility." (Opinion, p. 25.)

The charter gives no such right. It is undisputed that the pipe line corporation holds no franchise from the City

of Memphis to distribute gas. As shown by this court's decision in *Memphis Natural Gas Co.* v. *Beeler, supra,* the franchise was granted to the Memphis Power & Light Company, the distributing agency. In addition, the other proof in this present appeal, consisting in part of the deposition by Mr. Johnson, president of the pipe line corporation, shows that the pipe line corporation has never held any franchise from either the City of Memphis, the State of Tennessee or any agency thereof (R. 27). The pipe line corporation is domesticated in Tennessee and did get permits for the pipe line to be constructed under highways and roads. Permits to do these things do not result in the surrender of important Federal rights guaranteed by the Constitution. The State may not use these things as an excuse to subject a private corporation to public regulation.

It is said in *Williams* v. *Standard Oil Co.,* 278 U. S. 235, where Tennessee tried to subject the Standard Oil Company to the jurisdiction of the State Commission:

> "Nor need we stop to consider the further contention that appellees, being foreign corporations, may not carry on their business within the state except by complying with the conditions prescribed by the state. While that is the general rule, a well-settled limitation upon it is that the state may not impose conditions which require the relinquishment of rights guaranteed by the federal Constitution."

The Supreme Court opinion recognizes that the fees exacted are "to create a fund out of which the cost of administering public utilities in Tennessee should be paid" (Opinion, p. 29) such as the customary duty of fixing rates, appraisal of properties, employment of rate experts, attorneys, clerks, etc. They are not exacted to protect the public health and safety against dangerous physical conditions, and therefore are not fees collected under the

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State's police power to exact from interstate properties reasonable compensation for the inspection of such properties and the prevention of dangerous conditions.

Since the passage of the Natural Gas Act in 1938, *supra*, the Federal Power Commission is charged with the duty of doing all of these things for the regulation of interstate pipe line corporations. Before passage of the Act the States had no right to regulate such pipe line corporations. This was stated by the late Mr. Chief Justice Stone in *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, Footnote 1:

> "However in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of congressional action, not subject to state regulation."

The State of Tennessee insists, however, that it shall regulate this interstate pipe line and invade the Federal field. The Supreme Court ignored many Federal decisions, plainly holding that this interstate pipe line corporation is not subject to local regulation, and ignored particularly *Kentucky Natural Gas Corporation* v. *Public Service Commission of Kentucky*, 28 Fed. Supp. 509 and *Public Service Commission of Kentucky* v. *Kentucky Natural Gas Corporation*, 119 F. (2) (6 C., 1941), 417 dealing with a substantially similar situation as that at bar, and in which both of said courts held that both before and subsequent to the passage of the Natural Gas Act an interstate pipe line corporation which does not distribute gas locally cannot be subjected to State Commission control and regulation as such action violates the Commerce Clause.

It is respectfully submitted that the numerous Federal questions here involved are substantial and important, and

they have been decided by the Supreme Court of Tennessee in a manner inconsistent with the decisions of the Supreme Court of the United States as well as the other Federal Courts.

It is not appellant's insistence that the state statutes are unconstitutional in toto, but are unconstitutional as applied to the undisputed facts and this appellant.

See *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, in which the principle is stated upon which appellant relies:

> "Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error."

VI. It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal under Section 237(a) of the Judicial Code as amended.

July 30, 1946.

——— ———,
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APPENDIX

FOR PUBLICATION, GAILOR, J.

Davidson Equity

MEMPHIS NATURAL GAS COMPANY

v.

GEORGE F. MCCANLESS, Commissioner of Finance & Taxation, et al.

Opinion

This is a suit by the Gas Company to recover back inspection fees imposed under Code Section 5459, in the sum of $12,540.48 for the three years ending March 31, 1939. After a distress warrant was issued, the inspection fees were paid under protest, and the bill filed on October 2, 1939, for their recovery. The Defendant filed an answer. The Gas Company took its proof in May 1940, and after some delay on account of the induction of several State's Attorneys into military service, and the desire of the Gas Company to await the outcome of other litigation in which it was involved with the State, the case was set and submitted to the Chancellor on the depositions of Complainant and certain additional stipulations of fact. We quote in the course of the opinion some excerpts from these stipulations, but note at the outset, that it was expressly agreed that all of the facts appearing in the following decisions of cases in which the Memphis Natural Gas Company had been a party, shall be treated as part of *Complainant's* proof in this cause: Memphis Nat. Gas Co. *v.* Pope, 178 Tenn., 580; Memphis Natural Gas Co. *v.* Beeler, 315 U. S., 649, 86 L. ed., 1090; Memphis Nat. Gas Co. *v.* McCanless, 180 Tenn., 688; Memphis Nat. Gas Co. *v.* McCanless, 180 Tenn., 695. After the Chancellor had delivered a careful and comprehensive opinion which is preserved in the record, a decree was entered dismissing the bill, and the Complainant, Gas Company, has perfected its appeal to this Court.

In the brief filed by Appellant, there is apparently a single assignment of error which fails to conform with Rule 14, 174 Tenn., 873, et seq., in which the action of the Chancellor in dismissing the bill, is assailed by the assertion that the Memphis Natural Gas Company was not, during the years in question, (1) a public utility, (2) subject to control of the Railroad and Public Utilities Commission, (3) nor a corporation to which statutes relating to public utilities apply; that therefore, the inspection was both illegal and fictitious and the imposition of the fees therefor, was violative of the rights of the Gas Company under the "due process" (Amendment XIV) and "commerce" (Art. I, sec. 8) clauses of the United States Constitution, and of Art. I, sec. 21 of the Constitution of Tennessee; and that finally, the inspection fee is in effect, a gross receipts tax, not based on costs and expenses incurred by the State, in lawful discharge of its police powers and, therefore, the imposition of this tax on the Gas Company violates the "due process" and "commerce" clauses of the United States Constitution.

We consider first, the contention of the Gas Company that it was not for the three years ending March 31, 1939, a public utility subject to control and regulation by the Public Utilities Commission, nor amenable to statutes applying to public utilities in Tennessee.

Code Section 5448 defines a public utility, for the purpose of control and regulation by the Commission, as including common carriers of gas or any other like system, plant or equipment, affected by and dedicated to the public use under privileges, franchises, licenses, or agreements granted by the State or by any political subdivision thereof. During the three years ending April 1, 1939, being those for which the inspection fees have been imposed in this case, the Gas Company had, jointly with the Memphis Power & Light Company, a contract with the City of Memphis to furnish natural gas to all citizens of that municipality. The details and effect of this contract are set out at length in reported decisions; Memphis Nat. Gas Co. *v.* Pope, 178 Tenn. 580; Memphis Natural Gas Co. *v.* Beeler, 315 U. S. 649, 86 L. Ed. 1090; and are here to be treated under the stipulation as part of Complainant's

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proof. In the Pope case, supra, p. 585, it is found as a fact:

> ". . . that the bulk of all complainant's revenues from every source is derived from its business done with and through Memphis Power and Light Company."

During these same three years the Gas Company also had a contract to furnish natural gas to another retail distributing company, the West Tennessee Power & Light Company.

The Gas Company enjoyed privileges and franchises from the City of Memphis (Pope and Beeler cases, supra), from seven West Tennessee counties, and various franchises for rights-of-way over, through and upon State highways from the State Highway Department.

Pertinent provisions of the Gas Company's charter are:

> "The nature of the business of the company and the objects and purposes proposed to be transacted, promoted or carried on by it, are as follows:
>
> "(a) . . . and to carry on all of the businesses that are usual to or may be conveniently carried on *by gas companies or gas pipe line companies.*
>
> "At pages 1 and 2 of said charter, it is provided:
>
> "The nature of the business of the corporation and the objects or purposes to be transacted, promoted or carried on by it are as follows, to-wit: . . . (b) . . . to construct and maintain conduits and lines of tubing and pipe for the transportation of gas or oil *for the public generally* . . ." (Our emphasis.)

During the three years in question, the Company's commercial domicile was in Memphis, where it had offices and kept a crew of employees for operation and maintenance, and the Company was domesticated in the State of Tennessee, to do business here, though it was incorporated under the laws of the State of Delaware. For a disposition of the case on the facts before us, which are undisputed,

we find it unnecessary to determine whether powers granted to a corporation by the charter and not exercised, shall, nevertheless, render such corporation a public utility, or whether the character of the corporation shall be determined by the provisions of its charter, and not its exercise of power.

> "The answer to that question does not depend upon whether its charter declares it to be a common carrier, nor upon whether the state of incorporation considers it such; but upon what it does." United States *v.* Brooklyn Eastern District Terminal, 249 U. S., 296, 304, 63 L. ed., 613, 616.

> "The term 'public use' is a flexible one. It varies and expands with the growing needs of a more complex social order. Many improvements universally recognized as impressed with a public use were nonexistent a few years ago. The possibility of railroads was not dreamed of in a past not very remote, yet when they came the Courts, recognizing the important part they were to perform in supplying a public want, did not hesitate to take control of them as quasi-governmental agents and extend to them the right of eminent domain in order to equip them thoroughly to discharge the duties to the community which followed their grant of franchises. This is equally true as to other appliances which now form important parts of a rapidly widening system of social and commercial intercommunication. So it may be said at the present time that 'anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities' (In re Stewart (Minn.), 35 L. R. A.), and of which the general public, under reasonable regulations, will have a definite and fixed use, independent of the will of the party in whom title is vested, would be a public use. Mills on Em. Dom., Sec. 11." Ryan *v.* Terminal Co., 102 Tenn., 11, 118.

This exposition of the phrase "public use" by Chief Justice Beard, has been often quoted and followed in subsequent opinions of this Court. Power Co. *v.* Webb, 123 Tenn.,

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584, 590; Railroad *v.* Transportation Co., 128 Tenn., 277, 286; State *v.* Union Ry. Co., 129 Tenn., 705, 724; Webb *v.* Knox Co. Transmission Co., 143 Tenn., 423, 434; State ex rel. *v. City of Memphis*, 147 Tenn., 658, 676; Ferrell *v.* Doak, 152 Tenn., 88, 90; Armstrong *v.* Ill. Cent. R. Co., 153 Tenn., 283, 295; Housing Authority, Inc. *v.* Knoxville, 174 Tenn., 76, 84.

These same authorities make it abundantly clear that in our decisions, the terms "public use" and "public utility" are synonyms. The statutory definition of Code section 5448 determines those public utilities over which the Railroad and Public Utilities Commission is given control and supervision. Here it is necessary for us to determine, in view of the assignment of error, whether the Memphis Natural Gas Company is a public utility, and second, whether it is such public utility as is within the jurisdiction and control of the Commission.

It is not disputed that the sale of natural gas to the ultimate consumer is such an operation as is affected by and dedicated to the public use, nor that in the present case, the Gas Company was operating under privileges and franchises from the City of Memphis, seven West Tennessee counties, and the State of Tennessee through its Highway Department, and that the scope of the power granted the corporation in its charter, gave the corporation a right to operate as a public utility. The Gas Company does contend, however, in its supplemental brief, that the franchises, etc., mentioned in Code section 5448 are limited to such as are evidenced by what are known as certificates of "convenience and necessity," but we think it is unnecessary for us to settle that issue, since by the unusual way in which this case is presented here for our decision, the question has already been decided for us by the United States Supreme Court in a suit to determine the liability of the Memphis Natural Gas Company for the Tennessee State Excise Tax:

> "Taxpayer's (Memphis Natural Gas Company) contribution to the joint undertaking with the Memphis (Power & Light) company for the distribution of gas to local consumers, and its activities at its Memphis general office in supplying gas to be distributed for the

joint account as required by the Memphis company and in safeguarding and securing payment of its share of the profits, *went beyond the mere sale, to a distributor, of gas in interstate commerce. It also constituted participation in the business of distributing the gas to consumers after its delivery into the service pipes of the Memphis Company.*" (Our emphasis.) Memphis Natural Gas Co. *v.* Beeler, (Stone, C. J.) 315 U. S., 649, 656, 86 L. ed., 1090, 1096.

We have seen that the charter of the Gas Company gave it power to do business as a public utility and we think this definition of the very operation we are here considering, conclusively determines that the Memphis Natural Gas Company was exercising the power in the three years ending March 31, 1939, and further, under the jurisdictional definition of Code section 5448, that it was such utility as was amenable to supervision and control of the State Public Utilities Commission. The same finding by this Court in the Pope case, supra, is merely cumulative. Findings of fact in both these cases are to be given weight here as the Gas Company's own proof.

By simple rules of logic, the decision in the Beeler case, supra, was rendered inevitable by earlier opinions of the United States Supreme Court. Southern Nat. Gas Corp. *v.* Alabama, 301 U. S., 148, 81 L. ed., 970; Missouri, ex rel. *v.* Kansas Natural Gas Co., 265 U. S., 298, 68 L. ed., 1027; Lone Star Gas Co. *v.* Texas, 304, U. S., 224, 82 L. ed., 1304. In the last case, the question was one of the control by the Texas Railroad Commission of a Natural Gas Company piping gas in interstate commerce to retail distributing companies which were affiliates of the Natural Gas Company owning and operating the interstate pipe line. Viewing the sale and distribution of gas under such circumstances as a continuous operation and subject to control by the State Commission, Chief Justice Hughes said, in delivering the opinion of the Court:

"Thus, the latter companies and appellant are but arms of the same organization doing an intrastate business in Texas and the Commission was entitled to

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ascertain and determine what was a reasonable charge for the gas supplied through this organization to consumers within the State." Lone Star Gas Co. *v.* Texas, 304 U. S., 224, 237, 82 L. ed., 1304, 1313-1314.

The complete analogy with the case here needs no elaboration.

Since it is thus established that the Gas Company in the present case was, during the three years in question, engaged as a public utility in intrastate operation, there is no basis, whatever, for the argument that State control was precluded by the Federal Natural Gas Act of 1938 Federal Utility Regulation, Ann., Vol. 2, p. 639), since such argument has no reasonable basis unless the operation was exclusively interstate. If, for the legality of the levy of the State Excise Tax in the Beeler case, supra, this same operation by the Memphis Gas Company was one in intrastate commerce, as the U. S. Supreme Court in the Beeler case held it was, it is an intrastate operation here, since it is the same operation. The inspection fees here in question, were imposed for three years of that operation.

There have been changes and developments in the Company's method of business since that date, but those changes are not relevant to the inquiry here. The fact that the Company, since the imposition of the inspection fees, has made application and been put under control of the Federal Power Commission, can not affect our decision of this case, —on facts occurring before Federal control was effective. Furthermore, Federal control of the Natural Gas industry as it exists today, is not exclusive of State control but concurrent with it.

"The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere." *Public Utilities Commission* v.

United Fuel Gas Co., 317 U. S. 456, 467, 87 L. ed., 396, 402.

The first three sub-sections of the assignment of error are overruled, and we hold that in its operation during the three years preceding April 1, 1939, the Gas Company was a public utility, subject to regulation and control by the Railroad and Public Utilities Commission, and subject to all statutes of Tennessee having to do with public utilities.

It is next asserted that the inspection fees are an illegal charge since there was, in fact, no inspection; that the amount of the fees was not based on the expense to the State of making such inspections and that in fine, the imposition of the inspection fees is, in reality, the levy of a gross receipts tax. Since these contentions appear in the brief of the Gas Company as further subsections of its single anomalous assignments of error, we discuss them together.

In the first place, we find no justification for limiting the fees imposed here to the idea of inspection merely. The language of Code sec. 5459 imposing them, is much broader and states the purpose of the charge of these fees to be "for the inspection, control, and supervision of the business, service and rates" of the public utility against which the charge is made.

After providing in succeeding sections for the rate and time of payment of the fees, sec. 5465 provides that the Railroad and Public Utilities Commission shall file with the State Comptroller, a statement showing the fees to be paid by each utility, and that it shall be the duty of the Comptroller to collect said fees and to keep them in a separate account to be known as the "Public Utility Account," and there segregated.

By sec. 5468, the purposes for which funds in the Public Utilities Account may be lawfully expended, are set out and defined. These purposes include the employment of experts, engineers, attorneys, accountants and inspectors, whose compensation shall be paid only from the Public Utilities Account. *Cumberland Tel. & Tel. Co.* v. *Railroad and P. U. Com'n.* 287 Fed., 406. The fair and only reasonable inference from this legislation is that the Legislature

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intended, by the fees and fines paid into the Public Utilities Account, to create a fund out of which the cost of administering public utilities in Tennessee should be paid, and to provide that the cost of administering such public utilities should be wholly paid by the utilities themselves. There is nothing novel nor revolutionary in this legislative plan for the operation of a special administrative department of the State Government. The same scheme has been in effect for many years in several other departments, notably that of Insurance and of Banking, and it exists to greater or less degree in all departments where the purpose is the regulation of some sort of business or profession by a State Board or Commission. Provision for the independent support of the Board and payment of its operating expenses by the persons or companies affected by its administrative control, have been common legislative formulae in our State Government.

In view of the language of one of the stipulations by which the Gas Company agreed "that the Commissioner might collect the fee if it is decided that the complainant is liable for the fee," we have some doubt whether the Gas Company may go farther on this appeal than to secure a determination of liability for the fees under the operation of the Gas Company disclosed by the record. However, as there is a sharp controversy between counsel as to the proper construction of this language of the stipulation, we are unwilling to penalize the Gas Company by enforcing a limit on the scope of the appeal, which the Gas Company asserts that it did not intend to approve.

Returning, therefore, to a consideration of the propriety of the fees charged, we think the undisputed evidence of the Gas Company's witness Dearth makes it clear that the Commission did make some inspections of the operation and properties of the Gas Company, and since the facts disclosed by the Beeler and Pope cases, supra, make out a combined, continuing operation,—a joint enterprise of the Gas Company with the Memphis Power & Light Company,—we think it wholly reasonable that fees for "inspection, control and supervision" of the joint operation should be paid by both utilities for the purposes of the "Public Utility Account."

Moreover, the burden of showing both that the inspection was a fiction, and that the fees imposed therefor were excessive, was upon the Gas Company asserting these propositions. *McCanless* v. *S. E. Greyhound Lines,* 178 Tenn., 614, 629; *Clark* v. *Paul Gray,* 306 U. S., 583, 83 L. Ed., 1001. As stated, the only evidence on the point, is that of one of the Gas Company's witnesses who testified that inspections were made and there is no evidence, whatever, to support the argument that the fees charged were excessive. On neither point has the Gas Company carried the burden.

That natural gas, the commodity here involved, is, because of its explosive and asphyxiating potential, a dangerous instrumentality is too well known to be questioned. Being such, its transportation and distribution fall clearly and necessarily within the scope of the State police power for supervision and control in reasonable protection of the health and safety of the citizen, so that even if the operation of the Gas Company was exclusively interstate, which it was not in the three years preceding April 1, 1939, the State would not be precluded from inspection and control of the Gas Company's operation in the reasonable exercise of its police power. Thornton, Oil & Gas (Willis ed.) Vil. 3, sec. 795, p. 1099; *McCanless* v. *S. E. Greyhound Lines, supra; Kelly* v. *Washington,* 302 U. S., 1, 82 L. ed., 3. The constitutional validity of inspection, quarantine, health and other regulations, within the sphere of their acknowledged authority of a State is as clear as the power of Congress to establish regulations of commerce, notwithstanding that both operate upon the same subject. *Foster* v. *Master and Wardens* of the Port of New Orleans, 94 U. S., 246, 24 L. ed., 122.

> "The mere power of the Federal Government to regulate interstate commerce does not disable the States from adopting reasonable measures designed to secure the health and comfort of their people." *Clason* v. *Indiana,* 59 S. Ct., 609, 306 U. S., 439, 83 L. ed. 858. *Parker* v. *Brown,* 317 U. S., 341, 87 L. ed., 315.

There remains to consider the argument of the Gas Company,—that the inspection fees imposed were in reality a

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gross receipts tax. As stated, these fees are authorized by sections 5459-5465 of the Code of Tennessee. It is true that the amount of the fees is to be "measured by the amount of the gross receipts of each public utility" (sec. 5461), but the fees are to be kept apart and deposited in a "Public Utility Account" (sec. 5465), and from this account only expenses of the administration and supervision of public utilities may be paid. Use of funds in the account is limited to this purpose, and payment of administrative expenses is limited by the amount of this special fund. *Cumberland Tel. & Tel. Co.* v. *Railroad and P. U. Com'n., supra.* Such a levy is a special assessment for a specific purpose and lacks essential elements of a tax (Cooley Taxation, Vol. 1, sec. 33, *et seq.*). Here the Legislature decided that gross receipts from business done in the State provided a convenient yardstick for measuring the fair contribution of the public utility to the administrative expense fund. For the same administrative purpose, fees are imposed on banks on the basis of capital investment (sec. 5948), and without further illustrations, though they might be multiplied, we find it true that in no law of this sort, is the amount of the fee fixed by the actual cost to the State, of regulation, control, or administration of the specific utility or company against which the fee is assessed, but that utilities are required to contribute to the "Public Utility Account" for the administration of all utilities, and banks to the banking department for the supervision of all banks. The limit is that the expense may not be paid if it is incurred, unless the funds in the specific departmental accounts are sufficient. Law dictionaries, textbooks and cases from other jurisdictions, make it clear that the essential test to determine whether such fees are, or are not taxes, is whether they are, or are paid into the general public treasury and disbursable for general public expenses. *Cooley Taxation, supra; State, ex rel.,* v. *Gorman, (Minn.)* 41 N. W., 948, 2 L. R. A., 701; *Hauser v. Miller (Mont.)* 94 Pac., 197.

> "A tax is a sum which is required to be paid by the citizen annually for revenue for public purposes." *Mayor and Aldermen* v. *Maberry, (Green, J.)* 25 Tenn., 275, 278.

Even if the purpose of the assessment was limited to the exercise of the police power, fees imposed to defray the expenses of that exercise are not objectionable. *State* v. *Bixman, (Mo.)* 62 S. W., 828.

To be properly defined as "taxes" the fees must be paid into the public treasury as a part of the General Revenue and be subject to disbursement for the "General Public Need." cf. "tax" and "taxation," Webster's International Dictionary, Black's Law Dictionary, Bouvier's Law Dictionary; *Mayor and Aldermen* v. *Maberry, supra.*

For the reasons stated, the assignment of error and its various subdivisions are overruled, and the decree of the Chancellor is affirmed at the cost of the Appellant.

(Signed) GAILOR, *J.*